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In the Supreme Court of the United States

OCTOBER TERM, 1976

SOLITRON DEVICES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Renegotiation Act authorizes the Court of Claims to enter a judgment in aid of execution of an order of the Renegotiation Board pending final redetermination in that court, when the party requesting redetermination has failed to file a bond as required by the Act.

2. If so, whether the Act violates either Article III of the Constitution or the Due Process Clause of the Fifth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the United States Constitution and of the Renegotiation Act of 1951, 65 Stat. 7, as

amended, 50 U.S.C. App. (and Supp. V) 1211 *et seq.*, are set forth at Pet. App. C, pp. 19-27.

STATEMENT

Petitioner Solitron Devices, Inc., is a corporation engaged in the manufacture of solid state semiconductor devices. Part of its business has been government defense contracts subject to the Renegotiation Act of 1951, as amended, 50 U.S.C. App. (and Supp. V) 1211 *et seq.* (Pet. App. 2).

Under the authority granted to it by the Act (50 U.S.C. App. 1215), the Renegotiation Board determined that petitioner had realized excessive profits on contracts for four successive fiscal years, the last of which ended in February 1970. The Board ordered petitioner to pay back to the government approximately three million dollars, the amount of profits determined to be excessive. Petitioner thereupon filed a petition in the Court of Claims for *de novo* determination of excessive profits (see 50 U.S.C. App. (Supp. V) 1218). The government filed a mandatory counterclaim for the amounts awarded by the Board.

Under 50 U.S.C. App. (Supp. V) 1218, a petition for redetermination by the Court of Claims does not stay execution of the order of the Board unless a bond in an amount set by the Court of Claims is filed within ten days of the filing of the petition.[1] In this case, petitioner did not file the required bond. The government accordingly proceeded on its counterclaim to seek a judgment in aid of execution. The Court of Claims (*en banc*) entered such a judgment

[1]The recent practice of the Court of Claims is to require a bond in the exact amount of the order of the Renegotiation Board. See *Manufacturers Service Co.* v. *United States*, 518 F. 2d 1202. But cf. Pet. App. 6-7, 11.

(Pet. App. 1-15). As the court explained (Pet. App. 3), "[i]f recovery is had on such a judgment * * * it will not prevent [petitioner] from continuing to prosecute its litigation here, and if successful, it could of course recover with interest refunds to the extent necessary to effectuate our redetermination."[2]

ARGUMENT

1. Petitioner contends that the Court of Claims has no authority to enter a *pendente lite* judgment in aid of execution upon a petitioner's failure to file a bond as required by the Act. The Court of Claims correctly has consistently rejected this claim. *E.g., Sandnes' Sons, Inc.* v. *United States*, 462 F. 2d 1388; *O'Brien Gear & Machine Co.* v. *United States*, 199 Ct.Cl. 1014; *Manufacturers Service Co.* v. *United States*, 518 F. 2d 1202; *Bannercraft Clothing Co.* v. *United States*, 518 F. 2d 605.

The Act provides in pertinent part that "[t]he filing of a petition [with the Court of Claims] shall operate to stay the execution of the order of the Board * * * only if within ten days after the filing of the petition the petitioner files with the Court of Claims a good and sufficient bond, approved

[2]On December 16, 1976, subsequent to the entry of judgment in aid of execution, petitioner entered into a security agreement with the government providing for monthly payments of the excessive profits as determined by the Board, pending the outcome of the litigation. The amounts of the payments were determined by an outside expert to be both sufficient to eliminate the excessive profits as determined and compatible with petitioner's continued solvent operation, and the agreement provides that should the sums paid by petitioner exceed the amount ultimately determined to be due by the Court of Claims, the excess is to be refunded with interest at 8 ⅞ percent per annum (see 50 U.S.C. App. (Supp. V) 1218). We are lodging a copy of the security agreement with the Clerk of this Court.

by such court * * *." 50 U.S.C. App. (Supp. V) 1218.[3] Unless stayed in this manner, execution of the Board's order is to proceed "forthwith" by having the Board direct the service Secretaries to withhold current payment to the extent of the excessive profits (50 U.S.C. App. 1215(b)(1)) or by instituting an action in the "appropriate court[ ]" (50 U.S.C. App. 1215(b)(3)).

As the Court of Claims explained (Pet. App. 4), prior to 1971 redetermination and collection involved "two entirely different court procedures." Redetermination occurred in the Tax Court (65 Stat. 21), but that court was not an "appropriate court[ ]" for the purpose of an action to collect on the Board's order. Such actions were always in the district courts (see *Sandnes' Sons, Inc.* v. *United States, supra,* 462 F. 2d at 1390), although such courts had no authority to redetermine the amount of excessive profits (*ibid.*). If execution of the Board's order was not stayed, the district court's role was to assist in the collection of excessive profits, pending final redetermination by the Tax Court (*ibid.*; see *Hermetic Seal Products Co.* v. *United States,* 307 F. 2d 809 (C.A. 1)).[4]

In 1971, authority to redetermine was transferred from the Tax Court to the Court of Claims. Renegotiation Act of July 1, 1971, Pub. L. 92-41, 85 Stat. 97. A consequence of this transfer is that redetermination and collection can now proceed in the same court, since the Court of Claims can

[3]If no petition for redetermination is filed with the Court of Claims, the Board's order becomes final and nonreviewable. 50 U.S.C. App. (Supp. V) 1215(a); cf. *Lichter* v. *United States,* 334 U.S. 742.

[4]Prior to 1951, the predecessor Renegotiation Act expressly provided that a petition for redetermination in the Tax Court "shall not * * * stay the execution of the order of the Board * * *" (58 Stat. 87). The provision enabling a contractor to stay execution by filing a bond was added in 1951 (65 Stat. 22).

assist in the latter process by way of offset (28 U.S.C. 1503), or counterclaim (28 U.S.C. 2508).[5] Indeed, in *Sandnes' Sons, Inc.* v. *United States, supra,* 462 F. 2d at 1390-1391, the Court of Claims held that a claim by the government for assistance in the execution of the Board's order is a compulsory counterclaim to a petition for redetermination.

Against this background, it seems plain that the Court of Claims has authority under the Act to enter a *pendente lite* judgment in aid of execution in the circumstances of this case.[6] The government's counterclaim in the Court of

[5]Petitioner points out (Pet. 15-16) that 28 U.S.C. 2508 refers only to the authority of the Court of Claims to render a "final and reviewable" judgment "[i]f upon the whole case [the court] finds that the plaintiff is indebted to the United States." But 28 U.S.C. 2508 was enacted before the Court of Claims was given jurisdiction to redetermine orders of the Renegotiation Board and it therefore should not be construed as precluding the *pendente lite* relief that is so plainly contemplated by the Renegotiation Act. As the Court of Claims stated in *Sandnes' Sons* (462 F. 2d at 1391): "[the Renegotiation Act] is free from ambiguity and can only mean that the Government normally is entitled to our assistance in executing the order of the Board at once upon the filing of a petition without a bond." The court in *Sandnes' Sons* rejected the argument petitioner makes here, stating that (462 F. 2d at 1391): "This general language [28 U.S.C. 2508], * * * enacted long before we had renegotiation jurisdiction, must yield to specific language enacted especially for renegotiation cases."

[6]Contrary to petitioner (Pet. 10-11), such authority is not inconsistent with this Court's decision in *Renegotiation Board* v. *Bannercraft Co.,* 415 U.S. 1. *Bannercraft* concerned a contractor's rights under the Freedom of Information Act to enjoin Renegotiation Board proceedings; it has no bearing upon the totally different issue presented here. Petitioner relies (Pet. 10) upon this Court's observation in *Bannercraft* that "a contractor does not become obligated to remit excessive profits until termination of the Court of Claims suit, if it elects that course" (415 U.S. at 23). But an essential ingredient of the election to which the Court referred is the filing of a bond pending redetermination; since petitioner chose not to file that bond, it did not "elect" to postpone payment within the meaning of the Court's discussion.

Claims seeks execution of the Board's order. Execution is stayed "only if * * * petitioner files * * * a good and sufficient bond * * *" (50 U.S.C. App. (Supp. V) 1218). "[B]y an obvious negative pregnant, with no bond, collection by any available means, including suits * * *, is not stayed" (Pet. App. 5).[7]

2. Petitioner also contends (Pet. 17-23) that the Act, if construed as authorizing the Court of Claims to enter a *pendente lite* judgment in aid of execution, violates Article III of the Constitution or the Due Process Clause of the Fifth Amendment. This contention is insubstantial.

a. With respect to Article III, petitioner contends that a court may not enter an order without a finding of fact, and it submits that that is what the Court of Claims did here. This contention fails for the obvious reason that the court did make findings—*inter alia*, that the Board had entered an order against petitioner and that petitioner had failed to file a bond to suspend execution of that order (see Pet. App. 14)—and that those findings were a sufficient basis for the entry of a *pendente lite* order. Apparently petitioner seeks to characterize the Court of Claims as merely rubber stamping the Board's order, but such a characterization is wide of the mark. The Court of Claims has not given conclusive effect to the determination of the Renegotiation Board; it will proceed to determine the amount of excessive profits *de*

[7]As petitioner states (Pet. 14 n. 14), one district court in 1953 did hold that the Renegotiation Act does not authorize a court to enter a judgment against a contractor without a determination of the merits. *United States* v. *Miller*, 111 F. Supp. 368 (E.D. Mich.). But after that decision, Congress amended the Act to add the word "only" to 50 U.S.C. App. 1218: "The filing of a petition * * * shall * * * stay the execution of the order of the Board * * * *only* if * * * the petitioner files * * * a * * * bond * * *" (see 70 Stat. 791). The amendment removes any doubt as to Congress' intention regarding the government's right expeditiously to execute on the Board's orders when no bond has been filed.

novo. 50 U.S.C. App. (Supp. V) 1218; see *Renegotiation Board* v. *Bannercraft Co.*, 415 U.S. 1, 23-24. All the court has done so far is to protect the United States against loss pending disposition of petitioner's claim. The issuance of such a protective order *pendente lite* is well within the judicial function, and no case cited by petitioner is to the contrary.[8]

b. The entry of the *pendente lite* order in this case does not deprive petitioner of due process. Petitioner contends that it would be irreparably injured by the government's enforcement of the judgment (Pet. 7)[9] and that it is therefore entitled by the Due Process Clause of the Fifth Amendment to "some kind of predeprivation or prompt post-deprivation hearing" (Pet. 21, quoting *Commissioner* v. *Shapiro*, 424 U.S. 614, 629). But petitioner received a "predeprivation" hearing: the extensive proceedings before the Renegotiation Board themselves amply satisfy the requirements of due

[8]In the absence of the filing of a petition with the Court of Claims, an order of the Renegotiation Board is "final and conclusive and shall not be subject to review * * *." 50 U.S.C. App. (Supp. V) 1215(a). Orders of the Board that have become final in this manner may be enforced in the "appropriate court[ ]" (50 U.S.C. App. 1215(b)(3)) without further consideration of matters that might have been presented in a petition for redetermination. In *Lichter* v. *United States*, 334 U.S. 742, this Court approved this statutory scheme. Although the Court in *Lichter* did not give explicit consideration to Article III, the propriety of the *pendente lite* order here would appear to follow *a fortiori* from the Court's decision in that case.

[9]After the petition for a writ of certiorari was filed in this case, the parties entered into a security agreement providing for the payment of petitioner's liability in installments, in exchange for the government's agreement to refrain from exercising its right to obtain immediate execution of the Board's order. See note 2, *supra*. This agreement significantly reduces "the probability of irreparable injury" (*North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601, 608), and "the risk of an erroneous deprivation" of petitioner's property (*Mathews* v. *Eldridge*, 424 U.S. 319, 335).

process. The procedures followed by the Board in determining excessive profits were described by the Court in *Renegotiation Board* v. *Bannercraft Co., supra,* 415 U.S. at 15- 16:

> The renegotiation process itself is initiated by notice to the contractor and by assignment of the contractor's report to the appropriate Regional Board. * * * Personnel of the Regional Board then prepare a "Report of Renegotiation" which includes a "recommendation with respect to the amount, if any, of excessive profits for the fiscal year under review." * * * This is only the first of several steps within the agency structure. Thereafter the statement is reviewed, successively, by a panel of the Regional Board, by the Regional Board itself, and finally by the Renegotiation Board. At each level there is consultation with the contractor, the preparation of a report and analysis, and submission to the next higher level of a recommendation as to excessive profits. * * * At each stage, the contractor is entitled to a statement of the basis for the recommendation. Each level is free to make new findings and no level is bound by the determination of the level below; the recommended settlement may decrease or increase at each level. * * *

These procedures were followed in this case (see Pet. App. 17). The Board conducted lengthy financial and accounting investigations, and met with petitioner several times to hear and consider its arguments why profits during the years in issue had not been excessive. After considering the matter the Board issued a proposed opinion setting forth its findings and conclusions. There were further discussions,

and only then, after the Board and petitioner could not reach an agreement, did the Board issue its final opinion.[10]

Moreover, under the Act the execution of an order of the Board requires considerable involvement by the Court of Claims. The court has authority under the Act (50 U.S.C. App. (Supp. V) 1218) to fix and approve the bond that is required for the stay of execution. The court also has the opportunity to determine, at the time it is considering the government's motion for *pendente lite* judgment, "whether the board's orders were entered against the proper party, whether the procedures followed in entering the board orders were lawful, whether [petitioner] has paid the amount claimed by the board to be due, [and] whether it has in fact posted the required bond to stay * * *" (Pet. App. 14; see *id.* at 10-11).

The proceedings before the Board, when coupled with the judicial supervision of the collection process, fully satisfy the requirements of due process.[11] See *Mathews* v. *Eldridge,* 424 U.S. 319;[12] cf. *Mitchell* v. *W.T. Grant Co.,* 416 U.S. 600.

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[10]We are lodging a copy of the Board's opinion with the Clerk of this Court.

[11]This case is plainly distinguishable from *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.,* 419 U.S. 601, upon which petitioner principally relies (Pet. 22-23). There the Court invalidated a garnishment procedure that made no provision for notice or an opportunity for an early hearing. Unlike the situation in that case, the order here, "considering the Board's statutory independence * * *, the elaborate procedure it follows according to law and regulations, and its internal appeals * * *" (Pet. App. 10), is "more than a private creditor's *ipse dixit*" (*ibid.*).

[12]As the Court pointed out in *Eldridge* (424 U.S. at 335), the government's interest also is to be weighed in the balance to determine the requirements of due process in a particular context. Here the government's interest—either in collecting the amount of excessive profits promptly or in being adequately secured during litigation— is substantial. If neither the posting of a bond nor the payment of the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Board's award were required pending redetermination by the Court of Claims, contractors would have the opportunity to dissipate their assets and would be encouraged to extend the court proceedings in order to delay the time when final payment becomes due. See Pet. App. 5, 10. See also *Lichter* v. *United States*, 334 U.S. 742; *Renegotiation Board* v. *Bannercraft Co., supra.*

reply brief

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PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

I. The Government would avoid the authority of *Renegotiation Board* v. *Bannercraft Co.*, 415 U.S. 1, by dismissing as dictum this Court's discussion of the nature of the proceedings in the Court of Claims (*id.* at 23-24), and then reading something into the opinion which is not there. (Gov't Br. p. 5, n.6)

The proposition that "[t]he contractor may institute its *de novo* proceeding in the Court of Claims, unfettered by any prejudice from the agency proceeding and free from any claim that the Board's determination is supported by substantial evidence" (*id.* at 23), was necessary to the decision of Bannercraft's Free-

dom of Information Act suit to enjoin a pending Board proceeding. For, on the Court's analysis of the FOIA, the result turned on the "nature of the renegotiation process" (*id.* at 20), including the absence of irreparable injury to the contractor (*id.* at 23-24); this depended on the fact "that a contractor does not become obligated to remit excessive profits until termination of the Court of Claims suit, if it elects that course" (*id.* at 23). When the Government says that "an essential ingredient of the election to which the Court referred is the filing of a bond pending redetermination" (Gov't. Br. 5), it expresses a limitation which is nowhere to be found in the *Bannercraft* opinion, and which misreads the words that are there.

The phrase "elects that course" (415 U.S. at 23) refers to the institution of renegotiation proceedings, and even under the Government's theory the filing of a bond is not a condition precedent to invoking the Court of Claims' jurisdiction. Moreover, if this Court had been apprised of the contention that at the conclusion of the renegotiation proceedings the Government would be entitled to a judgment in aid of execution by the Court of Claims in the amount of the Renegotiation Board's order, the result in *Bannercraft* might well have been different. *Bannercraft* was decided (by a 5-4 vote) on the proposition that "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury" (*id.*, at 24). But an order which results in a judgment in aid of execution, prior to a "*de novo* hearing in the Court of Claims" does far more than impose "[m]ere litigation expense".

We think that if the Government had been confident that *Bannercraft* is genuinely distinguishable, it would

not have relegated to a footnote a matter of such obvious importance to the certworthiness of this case.

Even if this were a matter of first impression, the Court of Claims' interpretation of the Act would be incorrect (see Pet. 11-17). The Government itself reads the statute as providing that in the absence of a bond, "execution of the Board's order is to proceed 'forthwith' * * * or by instituting an action in the 'appropriate court[ ]' (50 U.S.C. App. 1215(b)(3))" (Gov't. Br. 4). But "instituting an action" differs mightily from obtaining a judgment in aid of execution before a resolution of the merits of that action. Moreover, the Government cites nothing in support of the proposition that the 1971 change of jurisdiction from the Tax Court to the Court of Claims evinced disapproval of the District Court decision in *Miller* (Gov't. Br. 6, n. 7); nor did the Government make such a showing below. Finally, the Government understates the Court of Claims' construction of the Act, which is not "that the Court of Claims has *authority* under the Act to enter a pendente lite judgment in aid of execution *in the circumstances of this case*" (Gov't. Br. 5, emphasis added), but rather is that

> "where a 100 percent bond is not timely filed, the Government possesses an immediate right to seek a judgment in aid of execution. Such judgment will be granted absent some compelling showing of unusual or mitigating circumstances."[1]

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[1] *Manufacturers Service Co., Inc.* v. *United States*, 518 F.2d 1202, 1208 (Ct. Cl.). No such showing has ever been made to the Court of Claims' satisfaction. See Pet. App. 6, discussing *Sandnes'*, the only case in which the Court even directed a hearing to determine whether "unusual or mitigating circumstances" existed.

Given the Court of Claims' understanding of its duty it is entirely correct to characterize its judgment in aid of execution "as merely rubber stamping the Board's order" (Gov't. Br. 6). We fully agree that the "entry of an order *pendente lite* is well within the judicial function" (*Id.*). But in order to qualify as a constitutionally sufficient judicial exercise of that function, more is required than the automatic issuance of a judgment after finding only that an order has been entered by a Governmental agency, and that a bond in the full amount of that order has not been deposited by a party. (*Id.* 6) At the very least, the question of judicial independence raised by the Court of Claims' view is of sufficient substance and importance to warrant this Court's concern.

On the due process issue, the Government contends that "petitioner received a 'predeprivation' hearing" as required by *Commissioner* v. *Shapiro,* 424 U.S. 614, 629 (Gov't. Br. 7). But the statutory procedures before the Renegotiation Board do not qualify as a "hearing" in the constitutional sense; that is not their function. As was said in *Bannercraft:* "The character and the entire atmosphere of the [Renegotiation Board] process is negotiation—that is, renegotiation—of an existing contract." 415 U.S. at 21. And the "considerable involvement by the Court of Claims" (Gov't. Br. 9) in no way even approximates what this Court's decisions require prior to the seizing of a person's property. See Pet. 21-23.

The substantiality and importance of the due process issue is further demonstrated by the recent decision of the Ninth Circuit in *United States* v. *Vertol H21C, etc.,* (*Aviation Contractors, Inc.*) 545 F.2d 648

(Nov. 1, 1976), reported after the Petition herein was filed.

In that case, the Federal Aviation Administration, on a warrant issued by the Clerk of Court, seized a helicopter belonging to Aviation Contractors as security for $6,000 civil penalties which the FAA believed should be assessed for violation of FAA regulations relating to helicopters. The Court of Appeals held that this seizure denied Aviation due process of law. The Court held that the private interest in not having the helicopter seized was "substantial" in light of "the trial court's finding that the government 'effectively paralyzed' " claimant's business by seizing the helicopter", and that "deprivation certainly rivals in severity the seizure of various types of consumer products." *Id.* at 651. Contrast the Court of Claims' opinion, which regards the seizure of a television set from an installment buyer as more worthy of procedural protection than Solitron's $3.8 million. See Pet. App. 11 and Pet. 25, n. 21.

The Ninth Circuit's decision also differs significantly from that of the Court of Claims in evaluating the Government's interest there is a close analogy between civil penalties claimed by the FAA against Aviation Contractors, and the Government's effort to recapture excess profits. The Ninth Circuit held that in the former situation the rule of *Phillips* v. *Commissioner,* 283 U.S. 589, which authorizes summary proceedings to insure the collection of taxes, is not applicable, 545 F.2d at 651; yet, the Court of Claims held that *Phillips* justified summary execution of the orders of the Renegotiation Board. See *Sandnes',* 462 F.2d 1388, 1392. These divergent views of the scope

of *Phillips* independently merit this Court's attention, particularly in light of *Shapiro, supra.*

II. The Agreement entered into between these parties well illustrates the practical consequences of the Court of Claims' interpretation of the Renegotiation Act, and the general importance of this case in the interpretation of that Act—which, indeed, the Government does not dispute. The Agreement recites, *inter alia:*

> "WHEREAS, payment of said Judgment [of the Court of Claims] or Orders of the Renegotiation Board by Solitron in full as indicated in the Report of Dr. Edward J. Mock to the Department of Justice dated July 7, 1976, would inflict irreparable injury to Solitron's continued operations, and for that reason, Solitron has offered to secure the United States on account of the amount which may ultimately be determined to be due the United States in the pending action, by agreeing to make monthly payments to the Department of the Army in the amounts recommended in the Report of Dr. Edward J. Mock, aforesaid; the agreement to make such monthly payments to be secured by First and Second Mortgages on real estate owned by Solitron."[2]

In addition to mortgaging its real estate in favor of the Government, Solitron is required to pay $42,000 per month for the first year, $67,000 per month for the next two years, $36,500 per month for the next year and the balance in monthly installments during the fifth year, totalling the entire amount of the Court of Claims' judgment plus interest at 8⅞%. The Government is entitled to execution on 10 days' notice in event of default of any payment of more than 20 days.

[2] P. 3 of the Agreement, which the Government has lodged with the Court.

This agreement is significant in two respects: First, it demonstrates by an independent source that the payment of the judgment would inflict irreparable injury on Solitron, thus, plainly bringing this case within the due process precedents on which the petition relied, and which were followed by the Ninth Circuit.

Second, it confirms the statement in our petition that the Court of Claims' interpretation of the Renegotiation Act greatly enhances the Government's bargaining power. The Court of Claims' judgment puts the business of the contractor at the mercy of the Government. The self-help procedures allowed by § 1215(b)(1) only enable the Government to withhold other monies due the contractor or to require others who do business with the Government to withhold monies; but the judgment allows the Government to levy on all contractors' assets. In *Manufacturers Service Co., Inc., supra,* the Court of Claims recognized the power that it was granting the Government: "It is defendant's responsibility to use the judgment wisely * * *" and added that "we as a court must presume that the Government will act in good faith and in the public interest" (518 F.2d at 1208). We do not dispute the Government's "good faith" or that its representative believe that the Agreement which they imposed on Solitron is in the public interest. But we believe that the statute does not contemplate and the Fifth Amendment does not permit private property to be thus subject to the "good faith" judgments of executive officers; rather they contemplate a judicial hearing before such property is seized.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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